No. 7966.

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In the United States Circuit Court of Appeals

For the Ninth Circuit.

Samuel S. Gelberg, Attorney for Creditors Committee of Western Blind & Screen Co., a corporation, also known as Western Venetian Blind Co., a corporation, and Creditors Committee for Western Blind & Screen Co., also known as Western Venetian Blind Co., a corporation,

Appellants,

vs.

E. C. Richardson, Receiver for Western Blind & Screen Co., a corporation, also known as Western Venetian Blind Co., a corporation,

Appellee.

APPELLEE'S BRIEF.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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APPELLEE'S BRIEF.

FACTS OF CASE.

The material portions, for the purpose of this appeal, of the agreed statement of the case entered into by the appellants and the appellee pursuant to Equity Rule 77 will be stated very briefly.

The appellee is the duly appointed, qualified and acting Receiver of all of the property and assets of Western Blind and Screen Co., a corporation, also known as West-

ern Venetian Blind Company, a corporation, by virtue of the order of the United States District Court for the Southern District of California, Central Division, made in Action #63-C of said court. [Tr. p. 10.]

As a part of the order appointing appellee as such Receiver, the said court made and entered the following minute order:

> "It is ordered that the creditors in the above entitled matter elect a committee of not less than three, whose duty it will be to acquaint themselves as to the general progress of the Receivership; that an inventory of all property of the Receiver be filed as soon as practicable, and financial report at the end of every 30 days period after the appointment." [Tr. p. 10.]

The Creditors' Committee was subsequently allowed to intervene as proper and necessary parties in the proceedings then pending before said court and said Creditors' Committee is one of the appellants herein. [Tr. p. 12.]

The appellee as said Receiver petitioned said court for instructions with respect to the payment of the claim filed against the Receivership estate for payment of fees of attorney for said Creditors' Committee. [Tr. p. 13.]

Thereafter an order to show cause was issued by the said court why said court should not order the said Receiver to pay the attorney for the Creditors' Committee, Samuel S. Gelberg, one of the appellants, the sum of $1250.00. [Tr. p. 29.]

The said Creditors' Committee petitioned for allowance of expense [Tr. p. 31] and Samuel S. Gelberg as attorney for Creditors' Committee, for allowance of compensation. [T. p. 40.] These petitions state among other things

that the said Samuel S. Gelberg, as attorney "played an important part in the concession by said Dorothy L. Gripton, whereby she consented to release $15,000.00 of said accounts receivable, which enabled the Receiver to obtain enough current cash to continue operations of the business." [Tr. pp. 34, 43.] The petition of said Samuel S. Gelberg states that the services of the said Samuel S. Gelberg as attorney for said Creditors' Committee are reasonably valued at $1250.00. [Tr. p. 46.]

At the hearing on the said petition and order to show cause of Receiver and petition of Creditors' Committee and attorney, the offers of the Creditors' Committee and Samuel S. Gelberg, attorney, respectively, of proof of the services rendered by said attorney for the Creditors' Committee was refused, and the petition of Samuel S. Gelberg for attorney's fees for services rendered creditors was denied. [Tr. p. 50.]

Legal Question Involved.

The sole question involved herein is—have the appellants stated in their respective petitions facts sufficient as a matter of law to require the granting of the prayers of said petitions?

It is the contention of the appellee that facts stated in said petitions are insufficient by reason of the following:

A. An attorney for a Creditors' Committee is not entitled to compensation from a Receivership estate without claiming either (1) that the attorneys for the Receiver were negligent, or that (2) what was accomplished by the attorney for the Creditors' Committee was outside the duties of the Receiver's attorney.

B. Appellants' petitions do not show that the receivership estate has been increased or benefitted through their efforts.

I.

An Attorney for a Creditors' Committee Is Not Entitled to Compensation From a Receivership Estate Without Claiming Either (a) That the Attorneys for the Receiver Were Negligent, or That (b) What Was Acocmplished by the Attorney for the Creditors' Committee Was Outside the Duties of the Receiver's Attorney.

We are here concerned only with the correctness of said court's refusal to hear evidence on the respective petitions of appellants and its ruling on said petitions. If said petitions failed to make out a proper case for recovery of attorney's fees, it was unnecessary for the said court to hear any evidence in respect thereto, and the order of said court must be affirmed. We submit that such is the state of the record in the instant case.

At the outset appellants are met with the proposition that where an attorney is retained by a Creditors' Committee the general rule should apply—each client should pay his own solicitor.

> *General Finance Corporation v. New York State Rys.* (D. C. N. Y. 1933), 3 F. Supp. 975, 976;
>
> *G. Ober & Sons. Co. et al. v. Macon Const. Co. et al.* (1897), 100 Ga. 635, 640; 28 S. E. 388, 390.

The appellants, however, seek to bring their case within the decisions of *Trustees of Internal Improvement Fund etc. v. Greenough* (1882), 105 U. S. 527, 26 L. Ed. 1157, and *Central R. R. etc. v. Pettus* (1885), 113 U. S. 116, 28 L. Ed. 915 (Appellant's Brief, pp. 5, 6, 7). There is, however, a marked distinction between these cases and the instant case which, with little question, takes the case at

bar out of the purview of said cases. This distinction has been very aptly phrased in

> *Weed v. Central of Ga. RR. Co.* (C. C. 5th Cir. 1900), 100 F. 162, 165;
>
> *General Finance Corporation v. New York State Rys.* (D. C. N. Y. 1933), *supra;*
>
> cf. *G. Ober & Sons Co. et al. v. Macon Const. Co., et al.* (Ga. 1897).

In the *Weed* case, *supra,* $15,000.00 was claimed from the receivership estate of the Central Railroad & Banking Company of Georgia by the appellants, who were attorneys for a creditor of said company, as allowance for solicitors' fees due to them, as they contended, for services rendered in the prosecution of the intervention of their client in an action which involved properties of said company.

The court in the *Weed* case denied recovery on two grounds: firstly, on the ground that the appellants neither made it appear that the attorneys for the Receiver would not have performed the services claimed to have been performed by the appellant, nor that the attorneys of the Receiver were negligent in their official duty in preserving the receivership property; and, secondly, that the appellants failed to show that their services resulted in a benefit to the receivership fund.

In differentiating the *Greenough* and *Pettus* cases, the court points out facts which show what is absent in the petitions of the appellants herein, and completely answers the contentions of appellants herein when it says (100 F. 162, 165):

"The appellants cite Trustees v. Greenough, 105 U. S. 532, 26 L. Ed. 1160, and Railroad Co. v. Pettus, 113 U S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915, in which the Greenough Case is quoted with approbation. An analysis of the facts in the pending case, and of the facts and reasoning on the rule of the court in the Greenough Case, shows clearly two distinct cases. In the pending case all the properties of the defendant companies which were liable on the tripartite bonds were in the hands of, and being administered by, a receiver, who was aided by counsel appointed by the court, and there is *no evidence to show that either the receiver or his counsel were negligent in their official duties in administering and preserving all the properties for the benefit of the creditors, or that they were negligent or inefficient in their efforts to conserve the interests of their trust by holding all three of the named railroads as co-obligors.* The interest of the receiver and of his counsel, in the line of their duties, was one in common with the interest of the intervenor. The ground upon which the court in the Greenough Case rested its purpose to give an allowance to the counsel therein seems to be set forth in a quotation which we have taken from it, as follows:

'As to the point made by the appellants, that the complainant is only a creditor seeking satisfaction of his debt, and cannot be regarded in the light of a trustee, and therefore is not entitled to an allowance for any expenses or counsel fees beyond taxed costs, as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But in a case like the present, where the bill was filed, not only in behalf of the complainant himself, but in behalf of the other bondholders having

an equal interest in the fund, and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust and where all this has been done, and done at great expense and trouble on the part of the complainant, and the other bondholders have come in and participated in the benefits resulting from his proceedings, if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trustent,* and to have secured its proper application to their use. There is no doubt, from the evidence, that, besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself, and, if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred.'

"The evidence in the pending case, as to the services of intervenor's counsel being useful to all of the other bondholders, is wholly unlike the evidence recited in the opinion quoted from the Greenough Case. In that case there was a maladministration by the trustee, and consequently a great waste of property that was under administration for the benefit of creditors. The evidence in that case shows that the

> complainant rescued the property from waste, and possibly utter destruction. In the pending case the evidence does not show that there were any betterments in the estate from anything that came peculiarly out of Tilney's intervention, nor does it show, as is made apparent in the Trustees v. Greenough Case, that the prosecution of Tilney's intervention resulted in reclaiming or rescuing the trust fund, or conserving any wasting fund or property, to be subjected to the creditors of the Central System". (Emphasis supplied.)

From the *Weed* case it is apparent that if the attorney for a Creditors' Committee is to obtain his fees from the receivership estate based upon the *Greenough* or *Pettus* cases, or otherwise, he must affirmatively claim that: (a) what he performed was outside the duties of the attorney for the receiver, or that (b) the attorney for the receiver was negligent or inefficient in his efforts to conserve the estate, or that (c) his efforts resulted in reclaiming a fund which the attorney for the receiver would not have done or did not do.

The appellants herein have not made any of such claims in their petition. [Tr. pp. 31-47.] The absence of these essential allegations suffices to uphold the rulings of the trial court.

In the *General Finance Corporation case, supra* (3 F. Supp. 975, 976) the court distinguished the *Greenough* case in the same manner as did the court in the *Weed* case, which distinction we submit should be controlling in the case at bar. It was conceded in that case that

> "the petitioner took the laboring oar in the proceedings before the Special Master and that to that ex-

> tent his efforts inured to the benefit of all of the claimants. It is left to the Court to decide whether under these circumstances an allowance to the petitioner for these services can be properly made out of the funds payable to the creditors. The petitioner was permitted to intervene in behalf of his individual client for the purpose of establishing the right of his client to a preference".

Nevertheless, the court denied recovery to the petitioning attorney and said (3 F. Supp. 975, 976):

> "In the case at bar the petitioning attorney did not create this fund. The fund existed and was in the hands of the Receivers for distribution. It cannot be said that the efforts of the petitioner secured the fund. The Receivers were represented by counsel and there was no danger that the fund would be distributed or negligently administered as was the situation in the Greenough case."

In *G. Ober & Sons v. Macon Const. Co.* (Ga., 1897), *supra,* certain creditors intervened in the receivership action and by their attorneys filed an independent petition which succeeded in speeding up the sale of certain of the property in the possession of the receiver. The intervening creditors petitioned for fees of their attorneys out of the estate. When the intervenors proceeded, at the hearing, to introduce certain testimony as to the value of the services of the attorney (which is identical with the situation here involved) the court interrupted the progress of the inquiry and announced that a solution of the question involved a question of law and not of fact. The court then sustained an oral motion to dismiss the petition and granted an order refusing to allow

the attorney's fees prayed for. The rule of law there established applies with equal force to the instant case. The court there said (100 Ga. 635, 638; 28 S. E. 388, 389):

> "It will be noted that the counsel moving for an allowance of fees in the present case were not the counsel of the original moving creditors, but were counsel of intervening creditors, who are permitted to become parties complainant to the bill only upon condition that, sharing its benefits, they will likewise assume to share proportionately the expenses and burden of the litigation. It will be further noted that all the assets of the defendant corporation had been seized by the court, and were then in the hands of its receiver, being held by him in the due course of judicial administration. The receiver presumably was represented by counsel assigned to him by the court; at all events, it would have been the duty of the court to have assigned counsel to him, had he required advice to the management of the affairs of the receivership. It is not apparent to us from the record that counsel for the intervening creditors who now move for this allowance of fees have performed such an extraordinary service, either in preserving or increasing the fund, as would entitle them upon equitable considerations, to be paid an extra allowance for that service. The duties which they performed in regard to this matter, if necessary at all, were only such duties as diligent counsel should have performed on behalf, and in the prosecution of the rights of, their own clients. The assets in question being already in the hands of the court, they discovered nothing, and brought to the custody of the court no property of which it was not then possessed."

Appellants Do Not Claim to Have Obtained a Concession for the Receivership Estate but Merely to Have Played Some Part in Such Accomplishment.

Aside from the fact that the statements in the appellants' petitions do not bring them within the doctrine of the *Greenough* and *Pettus* cases, the appellants have not at any time taken, nor do they in their brief take, the position that the release by Dorothy L. Gripton of $15,000.00 of accounts receivable was due solely, or even mainly, to the efforts of the said Samuel S. Gelberg. The most that appellants have claimed at any time is that Samuel S. Gelberg's efforts played "an important part in the concession by said Dorothy L. Gripton" and assisted in matters arising during the administration of the estate. [Tr. pp. 34, 35, 43-45.] If his services did no more than that, if the principal part of the negotiations for said concession and the administration of the estate was carried on by the receiver's attorneys, efficiently at all times, and the efforts of Samuel S. Gelberg were not needed in these respects, he cannot be said to have accomplished anything more than perhaps incidentally benefited the estate. For such services he is not entitled to compensation from the Receiver.

Davis v. Seneca Falls Mfg. Co. (C. C. 2nd Cir., 1927) 17 F. (2d) 546, 549;

In Re New York Investors (C. C. 2nd Cir., July 22, 1935), 79 F. (2d) 182, 186;

General Finance Corporation v. New York State Rys. (D. C. N. Y., 1933), *supra;*

Ober & Sons Co. v. Macon Const. Co. (Ga. 1897), *supra.*

In the *Davis* case, *supra,* the court said (17 F. (2d) 546, 549):

> "The allowance of $2000. for fees to the attorneys for the New York banks was improvidently granted. They were not the attorneys for the Receiver, and we must assume that they were properly retained to render services to their clients who were creditors only. *By their labors they may incidentally have benefited the other creditors,* but that does not justify an allowance for their services. *The Receivers were represented by counsel who successfully contested the claim.* At no time, until the allowance was made, did they make claim for services rendered to the creditors generally. After the services had been rendered with success by the attorneys for the Receiver, in having these transactions declared a preference, it was erroneous to grant an allowance to their counsel, who represent the banks who hold bonds similar to those of the three appellants, but who had been classified as unsecured creditors." (Emphasis supplied.)

The case of *Cuyler et al. v. Atlantic & N. C. R. Co.* (C. C. No. Carol., 1904), 132 F. 570, which has been cited with favor in appellants' brief at page 6, offers additional support to this contention.

The syllabus as quoted from the *Cuyler* case in appellants' brief has not been quoted in full. We set the syllabus out at length here with the portion italicized being the portion omitted in appellants' brief (132 F. 570):

> "A federal court of equity has power to make an allowance for counsel fees to a complainant who, as a joint owner of a fund or property, has maintained a suit for its preservation or protection, where it has been brought within the custody or control of the

> court, such allowance to be charged thereon; *but the power is discretionary, and will only be exercised where it is clear that a direct benefit has resulted to the property or those interested therein.*"

Since the power to make the allowance is discretionary, and requires for its exercise a clearly direct benefit to the estate, it seems obvious that appellants herein cannot prevail in the absence of allegations in their respective petitions showing a direct benefit by the actions of Samuel S. Gelberg—such allegations as already pointed out do not appear.

The court in the *Cuyler* case has said (132 F. 570, 572):

> "In all the cases in which allowances have been made there has been a direct benefit to the property or those interested therein".

The allowance in that case was claimed for the action instituted by the solicitors in order to obtain a favorable lease. The lease was obtained the court said, as (132 F. 570, 572) "the result of the action of the stockholders and directors of the corporation; *though indirectly* it may be, but not directly, the result of the suit. At least there is nothing before the court upon which to base this conclusion." (Emphasis supplied.) The court thereupon denied the claim. The analogy of that case to the one now before this court appears patent. Samuel S. Gelberg's services may have indirectly aided in obtaining the said concession but without additional allegations in his petition the court can make no ruling other than the one made.

In *In re New York Investors* (C. C. 2nd Cir., 1935), *supra,* the court, in denying Mr. Endelman his fees from the receivership estate for his services rendered to the intervening protective committee, said (79 F. (2d) 182, 186):

"Mr. Endelman was never attorney for the receivers, nor was any order made authorizing him to act on their behalf. He represented an intervening protective committee for the preferred stockholders of the Prudence Company whose 7% annual dividend was guaranteed by New York Investors, Inc. *although he frequently assisted in matters arising during the administration of the estate his services seem to have been such as were properly within the duties of the attorneys for the receivers,* except those which related primarily to securing and increasing the interest of the creditors whom he represented. *No claim is made that the services of the Receivers and their counsel were not capable or adequate* and that they have been, or are to be, awarded substantial compensation for their work. Under the circumstances, it is well settled that the services by the attorneys for an intervenor, however meritorious, cannot be paid out of the general estate." (Emphasis supplied.)

The Fact That the Creditors' Committee Has Been Permitted to Intervene Does Not Aid the Appellants.

The Creditors' Committee is a party to the proceeding by an order allowing intervention. This circumstance has been stressed by appellants as a basis for the application of equitable principles so as to allow the Creditors' Committee its expenses from the estate. However, in the *Weed, General Finance Corporation, G. Ober & Sons* and *In re New York Investors* cases, *supra,* the attorney seeking compensation represented a creditor or Creditors' Committee, which creditor and Creditors' Committee intervened in the action and were parties, nevertheless, where the essential elements, herein previously referred to were absent, the attorney was denied payment from the estate.

II.

The Petition of the Creditors' Committee and the Petition of Samuel S. Gelberg, as Attorney for the Creditors' Committee, Do Not Show That the Receivership Estate Has Been Enriched, Preserved or Benefited by the Rendition of the Services of Said Attorney.

The appellants, at page 4 of their brief, state that the services of Samuel S. Gelberg "enriched, enhanced and preserved" the estate. This allegation is of no importance in view of the fact that the petition sets forth a detailed statement of the services rendered. It was on the basis of this statement that the court refused to hear any evidence on the allegations of the petitions and decided that no showing was made which would justify an allowance for services rendered by Mr. Gelberg. In order that petitioner might be entitled to a reasonable compensation for the services rendered, it was necessary that the petitions should expressly show in what respect such services had "enriched, enhanced and preserved" the estate. This, we submit, is not shown. Though said attorney claims to have assisted in matters arising during the administration of the estate so long as his services were properly within the duties of the attorneys for the receivers, he has not so benefited the estate as to be entitled to an award from the general estate.

In re New York Investors (C. C. 2nd Cir. 1935), *supra.*

The part played in the obtaining of the said concession from Dorothy L. Gripton referred to in the petitions was within the duty of the Receiver and his attorney, and,

therefore, the part played by Samuel S. Gelberg in aiding in the acquiring of said concession cannot be said to have enhanced or preserved the estate. The petitions do not show that the attorney for the Creditors' Committee obtained this concession through their own efforts. It is consistent with the language of said petitions, that while appellant assisted in securing this concession, it might have been achieved by the Receiver's attorney alone.

The intervention of appellants did not result in reclaiming or securing a trust fund. It appears from said petitions only that appellants cooperated with the receiver in certain matters. It is well established that aiding the receiver's attorney is not sufficient to predicate a claim for attorney's fees from the estate, the services must have enriched the estate.

In re Gillaspie (D. C. W. Va. 1911) 190 F. 88, 91;

Central Tr. Co. of N. Y. v. Valley Ry. Co. (C. C. Ohio 1893) 55 F. 903;

Weed case (C. C. 5th Cir. 1900), *supra;*

General Finance Corporation v. New York State Rys. (D. C. N. Y., 1933), *supra.*

The court in the *Gillaspie* case, *supra,* expressed the rule which underlies the leading cases where an attorney other than the receiver's attorney seeks compensation from the general assets of the estate. The statement is there made:

> "The only proper cases that can arise where courts of equity and bankruptcy as well can award compensation to an attorney out of funds due others than his client is where, as I have heretofore indicated, such an attorney for one of a class has 'created' or secured a fund and brought it into the custody of

> the court, which fund is to inure, not alone to the benefit of his client, but to that of all those belonging to this class."

A careful examination of the cases cited by appellants for the position that Mr. Gelberg is entitled to his fees out of the estate for the services performed by him shows that circumstances are to be found therein which make those cases incompatible with the position of appellants.

Wherever the claim of an attorney, other than the receiver's attorney, has been allowed against the estate on the theory that the estate has been enhanced and preserved, the courts have always been astute to find that the attorney for the receiver was negligent and that the attorney claiming the fee by acting promptly succeeded in preventing the wasting of the assets of the estate. Appellants have not stated any facts in their petitions, that will support any such conclusion.

In the *Greenough* case, 105 U. S. 527, 26 L. ed. 1157 (1881), *supra,* most strongly relied upon by appellants and quoted at length at page 6 of appellants' brief, the Supreme Court reviews very fully the circumstances under which compensation is allowed to a complainant for services rendered for rescuing and bringing into court a fund which is afterwards distributed for the benefit of all the creditors. In that case the complainant, suing for himself and all other creditors, had in the fullest sense of the word rescued a fund which was being neglected and dissipated by the inattention of the trustee charged with the duty of protecting it. Large risks were taken by the complainant in said suit; not only the risk of being obliged to pay the costs of the proceeding, but liability for very expensive counsel fees, and for a very large outlay of money neces-

sary to secure testimony to establish his case. All this risk and outlay was as much for the benefit of the other creditors as for himself, and the facts disclosed a case in which the complainant literally rescued a very large fund, which would otherwise have been lost to the creditors. In that case the court allowed him liberal compensation, upon the ground that he had rendered great service to the other creditors, and without such service and expenditures on his part they would probably have lost all they had risked in the fund.

No such services are claimed for the applicants in this case. They have not added to the fund to be distributed among the creditors, nor have they saved a fund which would otherwise have been dissipated and lost. Their only claim is that they have assisted, without being requested, the receiver in the performance of his duty.

The *Cuyler* case (132 F. 570) cited in appellant's brief has already been referred to herein. There it was pointed out that that case is in fact opposed to the position of appellants.

In *Central R. R. v. Pettus* (1885), 113 U. S. 116, 28 L. ed. 915, cited in appellant's brief at page 7, it is true the court allowed the claim of the solicitors, but it based its decision on the *Greenough* case and said, referring to the creditors (113 U. S. 116, 123, 28 L. ed. 915, 918):

> "Co-operation among them was impracticable. If some did not move, the interests of all would have suffered. Hence Branch, Sons & Co. and their co-complainant instituted suit for the benefit of themselves and other creditors of the same class. They and their solicitors bore the *entire* burden of the litigation until the lien was finally declared. . . ." (Emphasis supplied.)

In *Harrison v. Perea* (1897), 168 U. S. 311, 42 L. ed. 478, cited at page 7 of appellants' brief, an attorney's fee was allowed out of the assets of an estate because, as the court said (42 L. ed. 478, 483):

> "By the exertions of the solicitor the fund was recovered, and it was properly made to bear some portion of the expense of its administration."

However, the court also pointed out (42 L. ed. 478, 479) that the petitioners

> "further alleged that in 1883 the elder Perea died, and that his estate *had not been properly administered;* that property belonging to the estate had not been inventoried as such; that the conduct of the administrators had been wasteful * * *" (Emphasis supplied.)

In *Dodge v. Tulleys* (1892), 144 U. S. 451, 36 L. ed. 501, cited at page 7 of appellants' brief, the court was concerned not with the fees of the attorney for creditors, but with that of the attorney of a trustee, an entirely different situation than that here presented.

In *Meddough v. Wilson* (1894), 151 U. S. 333, 38 L. ed. 183, quoted in appellants' brief at page 7, as pointed out by appellants, the attorneys for an assignee in bankruptcy were involved. That case offers no solace for appellants because there the assignees stood in the position of the appellee herein and not that of appellants. "As such assignees they represented not merely the mortgage creditors, but all the creditors and all the stockholders in the company," and "it was their duty as assignees to look after the interests of all having claims upon that property." (151 U. S. 333, 342, 343, 38 L. ed. 183, 186.)

Louisville E. & St. L. R. Co. v. Wilson (1891), 138 U. S. 501, 34 L. ed. 1023, cited in appellants' brief at page 8, is inapplicable to our present case because there the attorney was hired by the debtor before it went into receivership and continued his services after the appointment of the receiver. Samuel S. Gelberg was not in the employment of the debtor in this case before the appellee was appointed as receiver. Indeed, the attorneys in the *Louisville* case, *supra,* were denied fees out of the estate for their services in preventing the trustee under a deed of trust from taking possession of part of the receivership estate on the theory that they were primarily aiding their clients and not the estate.

In *Hein .v. Gravelle Farmers' Elevator Co.* (Wash., 1931), 2 Pac. (2nd) 741, quoted in appellants' brief at page 8, there was an actual attempt to divest the estate of certain of its assets. No such circumstance existed in the case at bar.

As appellants point out, at page 9 of their brief, *In re Dissolution of Henry Smith F. Coral Co.* (Mich. 1932), 355 N. W. 480, was a case in which the attorneys who were allowed a fee out of the estate acted as counsel for the law firm appointed as attorneys for the receiver, and from the report of the case were apparently chosen by the receiver's attorneys. Appellees' attorneys did not select the attorney for the Creditors' Committee or request his counsel.

Robinson v. Mutual Reserve Life Insurance Co. (C. C. 2nd Cir. 1911), 189 F. 347, quoted at page 10 of appellant's brief sets forth a rule for the compensating of attorneys from the general assets of the estate. A condition precedent to payment exists under that rule and that is

that a "complicated controversy" must exist. Whether or not such is the case is left to the sound discretion of the trial judge. Appellants have not by their petitions shown that such a controversy is present and the court was well within its discretion in denying the payment of the fees in question under the rule of said case. It was on just such a ground that the court in *Pennsylvania Steel Co. v. New York City Ry. Co.* (D. C. N. Y. 1915), 221 F. 440, 447, cited with approval at page 11 of appellants' brief denied payment of attorneys' fees.

It should also be noted that in the *Robinson* case the court's ruling was made with respect to a class of creditors not otherwise represented in the "complicated controversy". Such is not the case here. The distinction is a very material one.

> *Pennington v. Commonwealth Hotel Const. Corp.* (Del. 1931), 158 A. 140, 141.

In *Morgan et al. v. Grass, Fibre, Pulp & Paper Corp.* (D. C. Fla. 1926), 11 F. (2d) 431, 432, quoted in appellants' brief at page 10, the court held, contrary to appellants' position, that allowance to the attorneys of the creditor would not be allowed out of the general receivership estate.

The Court Order Ordering the Election of Creditors' Committee Does Not Give Right to Such Committee to Obtain Expenses From the Estate.

The order made by the court in respect to the appointment of the Creditors' Committee gives no foundation for requiring the estate to bear the expense of compensating its attorney. The court ordered the election of the com-

mittee so that the members of the committee might "acquaint themselves as to the general progress of the Receivership" [Tr. p. 10] thus wisely making for a well informed body of creditors and insuring a more satisfactory administration of the receivership. To contend, however, that such committee was thereby ordered to select an attorney to be compensated by the estate, is to urge that the estate hire two sets of attorneys, obviously an inexcusable duplication of expense, and unwarranted in logic or in law. However, if the said committee was to observe misconduct or neglect on the part of the receiver or its attorneys in the administration of the estate, it might well be that, if the attorney for the committee remedied such a situation by protecting the assets of the estate, a proper case might exist for these additional attorney's fees. The petitions of appellants do not indicate such a condition.

Appellants have, at page 14 of their brief, come to the conclusion that they *"have the actual consent of the only parties who will be affected by the allowance, the creditors"*. They arrive at this conclusion as a result: 1st, of the creditors selecting the Committee so that its acts become their acts, and 2nd, by the creditors failing to object to the allowance claimed by appellants. Appellants on the same page of their brief state that the memberships of the Creditors' Committee represents seventy per cent of the total indebtedness. There is no evidence of this fact in the record. But, even if it be true, there would be no justification for using the funds to which *all the creditors were entitled* to pay the debts of seventy per cent of the

creditors. In respect to the failure of any creditors to object to such allowance, it suffices to say that no necessity had arisen requiring such objections. There is no requirement that creditors or appellee file written objections before a hearing. At the hearing the court refused to hear any testimony in support of the applications and no occasion existed for any creditor to object. No importance can, therefore, be attached to the absence of objections. Furthermore, without objection from any source it was the duty of the court to refuse allowance of any claim which was not a proper or legal charge against the estate.

Conclusion.

While appellee does not question that the attorney for the Creditors' Committee in this case did his work ably and efficiently, the conclusion fully supported by the authorities is that the Receiver cannot legally pay him out of the funds in the estate, and that he must look to his clients for compensation.

The statement expressed in *G. Ober & Sons Co. et al. v. Macon Const. Co.* (Ga., 1897), *supra,* appellee contends, has real application here. The court in that case said (100 Ga. 635, 638):

> "To allow the payment of counsel fees for the special services rendered in this case would be to establish another precedent, for which we find no warrant in the books nor in the inherent justice and equity of the case, which might hereafter, and doubtless would, lead to pernicious consequences in the diversion of funds, which ought properly to be appropriated to the

payment of debts, into channels neither contemplated by the law nor justified by the purposes for which the property of a debtor is liable to seizure. This is one instance in which the counsel of the intervening creditor should look to his client for compensation. Accordingly, the court did not err in disallowing the application for attorneys' fees; and the judgment is therefore affirmed. All the Justices concurring."

Respectfully submitted,

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